A RARE FORCE MAJEURE SUCCESS, BUT STILL A NARROW ONE

Sucden Middle-East v Yagci Denizcilik Ve Ticaret Limited Sirketi, "The Mv Muammer Yagci"[1]

It is difficult successfully to argue that contractual performance has been prevented or delayed by force majeure (FM). This is in part because English courts or arbitration tribunals will interpret these clauses strictly and narrowly against the party seeking to rely on them. Recent decisions, including Triple Point Technology v PTT (2017)[2] and Seadrill Ghana v Tullow Ghana (2018)[3] are evidence of this approach. However, Sucden Middle-East, represented by Nick Fisher of HFW, has recently relied successfully on such a clause in the Commercial Court, on appeal from arbitration.

1. http://www.bailii.org/ew/cases/EWHC/Comm/2018/3873.html
2. http://www.bailii.org/ew/cases/EWHC/TCC/2017/2178.html
3. http://www.bailii.org/ew/cases/EWHC/Comm/2018/1640.html
   HFW (Simon Blows and Vanessa Tattersall) represented Tullow Ghana

Background

The case involved a shipment of sugar to Algeria on the Sugar Charter Party 1999 form. The facts found by the arbitral tribunal were that when the cargo arrived in Algeria the cargo receivers submitted false import documents to local customs authorities. The local customs responded by seizing the cargo, using powers under customs laws and regulations. A delay to discharging the cargo of four and a half months ensued. Sucden, as charterers, claimed this delay fell within the exceptions to laytime running under clause 28. Owners disagreed. At first instance, the arbitral tribunal agreed with owners. Charterers appealed to the Commercial Court. Permission to bring the appeal was given on the basis that the question of law was one of general public importance, as it related to a standard form contract in wide commercial usage.

The judgment

The question before the Commercial Court was: "where a cargo is seized by the local customs authorities at the discharge port causing a delay to discharge, is the time so lost caused by 'government interferences' within the meaning of clause 28 of the Sugar Charter Party 1999 form?". Clause 28 reads:

"Strikes and Force Majeure"

"In the event that whilst at or off the loading place or discharging place the loading and/or discharging of the vessel is prevented or delayed by any of the following occurrences: strikes, riots, civil commotions, lockouts of men, accidents and/or breakdowns on railways, stoppages on railway and/or river and/or canal by ice or frost, mechanical breakdowns at mechanical loading plants, ***government interferences****, vessel being inoperative or rendered inoperative due to terms and conditions of employment of the Officers and Crew, time so lost shall not count as laytime on demurrage or detention..."*

In deciding whether an FM event had occurred, the Court focused on the construction of "government interferences". It was fairly straightforward to establish that a government entity acting in a sovereign capacity was involved, but Owners argued that the government being involved was not enough and that there had to be "interferences". In reaching its decision that there had been no interference, the tribunal had considered it a key point that seizure was an "ordinary" action. The Court rejected this conclusion. It held that the seizure of the cargo was not routine and did fall within the meaning of "interferences". Seizure is a significant exercise of executive power and therefore could not be regarded as "ordinary". Suspected or predictable consequences are not the same as ordinary actions (such as the inspection of the cargo by a government surveyor): *"In the usual course of things cargo is not seized and property rights are not invaded in that way."* The very fact that false documents were involved showed that the circumstances were not routine.

The Court emphasised that it was of "real importance" that its conclusion on the language was not difficult to apply; nor did it in any way offend commercial common sense.

The Owners' causation argument was also dismissed, as it was held that the seizure caused the delay, even if the submission of false documents caused the seizure.

In allowing the appeal, the Court still maintained the strict and narrow approach to FM, stressing that *"the answer given to the question is only a narrow "yes". It is "yes" where the circumstances are as in the present case. The answer does not address all of the circumstances that may come within or fall outside clause 28. The answer is concerned only with the seizure of a cargo and with that seizure by a customs authority that is a State revenue authority acting in a sovereign capacity."*

HFW Comment

This judgment gives some welcome publicly available guidance on the interpretation of a FM clause in a standard form widely used in sugar trading. Whilst the charterers were successfully able to rely on the FM clause in this case, it does not signal a change in the strict and narrow approach typically adopted by the English Courts.

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